

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA, petitioner, v. WESLEY L. SISCHO.	}	No. 76.
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

THE WORD "MERCHANDISE" IN SECTIONS 2806, 2807,
AND 2809 OF THE REVISED STATUTES INCLUDES AR-
TICLES THE IMPORTATION OF WHICH IS PROHIBITED,
FOR THE WORDS "CAPABLE OF BEING IMPORTED" IN
SECTION 2766 INCLUDE ILLEGAL AS WELL AS LEGAL
IMPORTATION.

The word "import" means to bring into the United
States, and is defined by the Standard Dictionary as
follows:

To bring from a foreign country or state
into one's own country or state; introduce
from abroad, especially commercially; opposed
to *export*; as, to *import* woolen goods; to *im-*
port labor.

In the Revised Statutes and in the Act prohibiting the importation of opium, the word "import" is used as synonymous with "bring into."

Section 3280, Revised Statutes, provides that if any person shall fraudulently or knowingly "import or bring into the United States" "any merchandise, contrary to law, or shall receive, conceal, buy, sell" or "facilitate the transportation," etc., of "such merchandise after importation, knowing same to have been imported contrary to law," etc. It is apparent that the words "importation" and "imported" mean the same as the other words, "import or bring into."

The Act of January 17, 1914, the Act under consideration, after making it unlawful to "import" opium, in section 2, makes it an offense to receive, conceal, buy, sell or facilitate the transportation or concealment or sale of such opium "after importation, knowing the same to have been imported contrary to law." Here the words "import" and "importation" clearly mean "bringing in."

In the following cases it has been held that the word "importation" means bringing into the United States, irrespective of whether the bringing was lawful or unlawful:

Feathers of Wild Birds v. United States, 267 Fed. 964. (Under R. S. 3082.)

Daigle v. United States, 237 Fed. 818. (R. S. 3100.)

Harford v. United States, 8 Cranch 109.

Goldman v. United States, 263 Fed. 340.

The Schooner Boston, 1 Gallison 239, Fed. Cas. No. 1670.

In the *Goldman Case* it was held that Section 3082 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise with intent to avoid paying duty. The court said:

The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them but to make disobedience of them criminal. This Congress accomplished through the enactment of section 3082, the effect of which, as we construe it, is to punish criminally and by forfeiture the bringing into the United States of any merchandise, whether dutiable or nondutiable, contrary to law, and the receiving and buying of it knowing it to have been brought in contrary to law. "Contrary to law" we construe to mean to be in violation of any regulation, relating to its introduction, established by law (other than section 3082 itself) and made punishable when disobeyed. *Keck v. U. S.*, 172 U. S. 434-437, 19 Sup. Ct. 254, 43 L. Ed. 505; *One Pearl Chain v. U. S.*, 123 Fed. 371, 59 C. C. A. 499; *Estes v. U. S.*, 227 Fed. 818, 142 C. C. A. 342.

It is obvious that the expression "may include goods, wares, and chattels of every description capable of being imported" has a different meaning from that which would be implied in the expression "shall include *only* goods, wares, and chattels capable of being imported or capable of being *lawfully* imported." The same method of expression is used in the following Section 2767, providing that the word "port" "may" include any place from which merchandise "can be shipped for importation." Surely it would not be held that the words "can be shipped for importation" meant "can lawfully be shipped for importation." If the word "imported" means "brought in," whether lawfully or unlawfully, then "merchandise" as defined in Section 2766 includes goods capable of being brought in or imported contrary to law.

II.

THE WORD "MERCHANDISE" INCLUDES ARTICLES THE IMPORTATION OF WHICH IS ILLEGAL.

United States v. Thomas, 4 Benedict 370.

United States v. Claflin, 13 Blatch. 178.

United States v. Kee Ho, 33 Fed. 333.

The Ivor Heath, 275 Fed. 67.

It also includes articles brought in as passengers' baggage not intended for sale.

United States v. Chesbrough, 176 Fed. 778.

Von Cotzhausen v. Nazro, 15 Fed. 891.

III.

CAN CONGRESS HAVE INTENDED THAT PROHIBITED ARTICLES SHOULD BE MANIFESTED ?

Congress has distinctly said so in the Tariff Act of 1922.

The Tariff Act of 1922, Section 401, defines "merchandise" as "goods, wares, and chattels of every description and includes merchandise, the importation of which is prohibited."

Furthermore, the very Act under discussion, that of January 17, 1914, Section 8, seems to provide in so many words that the opium shall be manifested, when it says that "Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which is not shown upon the vessel's manifest, as is provided by sections twenty-eight hundred and six and twenty-eight hundred and seven of the Revised Statutes," etc.

It is urged that these various provisions are for the exclusive protection of the revenue. We contend that the purpose is broader. It is for the general protection of the frontier of the country. That the provisions relating to manifests are not solely for the protection of the revenue is obvious from the fact that Sections 4197 to 5200, inclusive, require manifests of outbound cargoes, and Section 3116 requires manifests for vessels in the coast trade departing from any port to one in another collection district.

But it would seem that the provision might have, even in the case of opium whose importation is prohibited, a direct relation to the revenue, for, on January 17, 1914, another Act of Congress became a law, 38 Stat. 277, c. 10, entitled "An Act regulating the manufacture of smoking opium within the United States and for other purposes." This Act imposed an internal-revenue tax of \$300 per pound upon all opium manufactured in the United States for smoking purposes and required every manufacturer to comply with regulations to be approved by the Secretary of the Treasury and to give a bond for not less than \$100,000, and also made provisions for stamping such opium to indicate the payment of the tax.

The amount of opium imported unlawfully by Sischo is alleged to have been 100 five-tael tins of opium. This would amount to approximately 40 pounds, which amount, if manufactured in the United States, would have entitled the Government to about \$12,000 in taxes.

It is urged that it is incredible to expect a captain to manifest articles whose importation is illegal and thereby furnish the evidence of his own crime.

This is no more unreasonable, however, than it is to expect him to manifest articles which he intends to smuggle, or to obtain a permit to land such articles.

This provision may well be considered, however, as affording protection to an innocent captain as well as imposing penalties upon the guilty. An

honest captain will have no difficulty in complying with it. Section 2810 of the Revised Statutes provides that if the error was due to mistake no penalty or forfeiture should be incurred, and under the provision of Section 4 of the Act of January 17, 1914, it is made the duty of any person who has knowledge of the presence on any vessel of smoking opium to report the same to the proper officer under severe penalties, and it is also provided that the master shall not be liable if he shall satisfy the jury that he had no knowledge and used due diligence to prevent the presence of the articles on his vessel. Should a captain discover that without his knowledge smoking opium had been taken aboard his vessel it would be his duty to list that opium upon his manifest and call the attention of the revenue officers to it at the first opportunity.

If he was innocent of any wilful wrongdoing in taking the opium on board, he would thereby show his innocence and free himself from liability. If he should not take that course, he would be justly liable to a penalty for violation of the section. It is conceivable that he might be in doubt as to whether opium which he had on board was smoking opium, the importation of which was prohibited, or some other variety of opium, the importation of which was lawful. The proper course for him to take would be to describe it upon the manifest, thereby exonerating himself from any charge of concealment, and allow the revenue officers themselves to make the decision as to its character.

A practical illustration of the situation in the case of a law-abiding captain was the subject of an opinion by the Attorney General to the Secretary of the Treasury under the Act of February 9, 1909, which was the original act forbidding importation of smoking opium. In that case a vessel arrived at the port of San Francisco, having on board a package of smoking opium duly shown by the manifest. The ultimate destination of the package was a foreign country, and the intention was that the package should be brought into the port of San Francisco and there put aboard another vessel to be borne to its foreign destination. This situation was reported to the Secretary of the Treasury, and he asked the opinion of the Attorney General whether such transfer could be allowed.

Mr. Wickersham advised that the transfer could lawfully be made (27 Ops. A. G. 440). The only bearing which this case has is that it shows the reasonableness of the requirement that articles of this questionable character should be listed upon the manifest by all those who desire to observe the law. If the captain of that vessel had adopted the course of concealing the opium and attempting to transfer it to the other vessel without the knowledge of the officers of the United States, he would have been in the same situation that Sischo is to-day. We can see no force in the argument that Congress did not intend a law to require something which, of course, the deliberate lawbreaker would not be expected to do.

IV.

THE OPIUM WAS NOT WITHOUT VALUE.

It cost Sischo \$6,400.

Its manufacture in the United States was not unlawful. 38 Stat. 277.

The sale of smoking opium does not seem to have been unlawful under the Act of December 17, 1914. 38 Stat. 785.

It could be used under the Revenue Act of 1918. 40 Stat. 1057.

Section 1008 of the Revenue Act of 1918 (February 24, 1919) provides:

That all opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, which may now be under seizure or which may hereafter be seized by the United States Government from any person or persons charged with any violation of the Act of October 1, 1890, as amended by the Acts of March 3, 1897, February 9, 1909, and January 17, 1914, or the Act of December 17, 1914, shall upon conviction of the person or persons from which seized be confiscated by and forfeited to the United States, and the Secretary is hereby authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulation as may be prescribed by the Commissioner, with the approval of the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States.

The provisions of this section shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of any of the above-mentioned acts, where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said acts, or the provisions of this section, shall be destroyed without certification by a committee appointed by the Commissioner, with the approval of the Secretary, that they are of no value for medical or scientific purposes.

As Judge Hunt said, in his dissenting opinion (p. 37, 38):

With respect to the value of the smoking opium, the rulings of the Treasury Department provide that for the purpose of assessing the fine under section 2809, *supra*, the value of the prohibited opium is the foreign value. Treas. Dec. No. 32083, December, 1911. In the present instance the value of \$6,400 was fixed by the custom officers as based upon the statements of the defendant below, who said that he had paid that sum for the opium in British Columbia. In a case of this character this was sufficient evidence of the value.

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